s 9(3)(a) or the minister under s 9(5). The most the Director General can do to resolve the matter under sub-s (4A) is (after exercising his powers under sub-s (4B)) to advise the employer to accord recognition. If the advice is accepted and recognition is accorded the matter is resolved under sub-s (4A). Otherwise the matter is not resolved and has to be referred to the minister for his decision.

Now I come back to this application. The Act does not define the word 'resolve'. *Webster's New World Dictionary* gives the meaning as 'to make a decision about' or 'to come to a decision' while *Chambers' Twentieth Century Dictionary* gives the meaning as 'to solve, to dissipate, to free from doubt or difficulty' and the *Universal Dictionary of English Language* 'to become void, to lapse'. In the context of s 9 of the Act, I prefer to take 'to become void, to lapse' as the meaning of the word 'resolve' in s 9(4A) of the Act. A matter becomes resolved when the obligation of the Director General to resolve has been brought to an end.

As I said earlier, the obligation of the Director General to resolve arises only upon receipt by him of either an application under sub-s (3)(c) or a report under sub-s (4). Therefore if a trade union withdraws its claim for recognition before the matter has become a matter for the Director General to resolve, the matter cannot be said to have been resolved by the Director General under sub-s (4A) and therefore s 12 of the Act does not apply. But if the union withdraws its application for recognition after the Director General has started to take steps and make inquiries pursuant to sub-s (4A), the matter of the application for recognition must be considered to have been resolved and accordingly s 12 of the Act applies. In this case, the trade union withdrew its application after the Director General had taken steps and made inquiries towards resolving the application. Section 12 of the Act therefore applied.

Counsel for the plaintiffs also contends that for s 12 of the Act to apply there must have been a decision not to accord recognition. He relies first, on the marginal note to s 12 which says 'Trade Unions not accorded recognition' and secondly, to the explanatory statement to the Bill of Parliament to amend s 12 of the Industrial Relations Act 1967 which says 'Clause 4 seeks to amend s 12 of the Act to extend the waiting period from three months to six months before a trade union would be allowed to submit a fresh claim for recognition after an *earlier claim for recognition has been rejected.*' (Emphasis is added.)

I was referred to the case of *Stephens* v *Cuckfield Rural District Council*[1] where it was said:

> While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mind.

Reading s 12 of the Act, I find there is no ambiguity at all. There is no need to use the marginal note as an aid to the construction of the section. The section is very clear. The section applies not only to a claim where recognition is not accorded but also to a claim which has been resolved under s 9(4A). Similarly with regard to the explanatory statement. There is no ambiguity in the section. 'Even when words in a statute are ambiguous so that they may be construed in more than one sense regard may not be had to the Bill by which it was introduced.' (*Herron* v *Rathmines and Rathgar Improvement Commissioners*[2] at p 501.)

The application is dismissed with costs.

Application dismissed.

Solicitors: *Shan & Gooi; Ranjit, Thomas & Kura.*

Reported by *Mathavan Devadas*

Lembaga Kemajuan Tanah Persekutuan v Muda bin Jusoh & Anor

HIGH COURT (SEREMBAN) — CIVIL APPEAL NOS 12-19 AND 12-20 OF 1988
MUSTAPHA HUSSAIN J
26 MARCH 1990

Labour Law — Workmen's compensation — Appeal from award of arbitrator — Whether claim time-barred — Who is principal — Workmen's Compensation Act 1952, ss 12(1) & 19(1)

Words and Phrases — 'Trade' — Workmen's Compensation Act 1952, s 19(1)

Words and Phrases — 'Business' — Workmen's Compensation Act 1952, s 19(1)

Both respondents were injured while they were employed by contractors engaged by the appellant. They applied for compensation under the Workmen's Compensation Act 1952 ('the Act'). The arbitrator found that the appellant were the respondents' principal and ordered compensation to be paid. The appellant appealed alleging that the claims were time-barred and that their contractors were the rightful principals.

Held, dismissing the appeals:

(1) Both claims were time-barred as they were not brought within six months of the accident. However this point was not raised in the arbitration proceedings. As such, this point of law could not be considered on appeal.

(2) It was the business of the appellant to fell trees and clear areas for resettlement. The appellant employed contractors to do this work and the contractors in turn engaged the respondents.

(3) The work that was being carried out by the respondents, even though they were employed directly by contractors, was in the course of and for the purpose of the appellant's business. It

followed therefore that the appellant was the respondents' principal within the meaning of s 19(1) of the Act.

(4) 'Trade' is the practice of some occupation, business or profession habitually carried on as a means of one's livelihood or gain.

(5) 'Business' is the status of being busily engaged in anything. It also encompasses trade, profession, any work or occupation, dealing and commercial transaction.

[*Editorial Note*: The respondents in the first and second appeals have appealed to the Supreme Court vide Civil Appeal Nos 01-29-90 and 01-25-90 respectively.]

Legislation referred to
Workmen's Compensation Act 1952 ss 12(1), 19(1)
Public Authorities Protection Act 1948 s 2(a)

S Kulasegaran for the appellant.
Aminuddin Ahmad for the respondents.

Cur Adv Vult

Mustapha Hussain J: Both the two civil appeals were agreed to be heard together as the law applicable is the same. Only the name of the respondent and date of filing the claim by the respondent in the two appeals are different.

The respondent in Civil Appeal No 12-19 of 1988 ('first appeal') was employed by a contractor named Fang Lam Patt @ Fang Sum Yoon on 23 June 1979 as a chain saw operator to fell trees and was paid $25 per day and the respondent was assisted by his friend named Ali bin Ismail who was paid $15 per day. Payments were made after the respondent had completed a block of about 86 acres.

The respondent in this first appeal worked from 8am to 3pm with no allowance and if required to work after 3pm he will be paid overtime.

This contractor Fang Lam Fatt was engaged by the appellant (FELDA) to fell and clear the jungle and prepare the land for rubber planting. After working for about one month and three days an accident happened in which the respondent sustained fracture of his leg. His evidence reads as follows:

> ... after my lunch break when I was felling a big tree, it fell on me before I could move away ...

He was warded in hospital for 90 days. He was paid $1,600 as wages due to him and his assistant even though he had not completed the block.

The respondent in Civil Appeal No 12-20 of 1988 ('second appeal') was similarly employed by Syarikat Muhibbah Jaya in 1980 and was engaged in felling and clearing trees in Felda Kepis. He was employed by one person by the name of Lee and he was paid $30 per day. In the course of work, a tree fell on him and he was injured. He suffered dislocation of his shoulder and fracture of upper arm.

Another matter which is undisputed is that the appellant (FELDA) had no dealings whatsoever with the respondent in either case, nor any say in his appointment or employment, terms and conditions of his service and on the payment of wages. The respondent in the first appeal was employed by the contractor Fang Lam Fatt. The respondent himself said, 'it was Mr Fang Lam Fatt who personally employed me.' He said further, 'About 100 workers were involved in this contract work under Fang Lam Fatt.'

The place of work of Muda bin Jusoh was at Felda Serting 4. He had seen Felda officers coming to the scheme.

The other point which is not disputed is that the respondents had instituted their action against the appellant by Borang G of the Workmen's Compensation Act 1952 ('the Act'). Muda bin Jusoh instituted the action on 25 May 1983, which is *three years and ten months* after the accident which in his case took place on *26 July 1979*.

Ismail bin Omar, the respondent in the second appeal, instituted the action on 31 May 1983, which is *two years eight months and twelve days after* the accident on *18 September 1980*.

An inquiry was held by the Commissioner for Labour at Kuala Pilah on 10 August 1983 under s 27 of the Act into the case of Muda bin Jusoh and he computed a compensation of $7,787.33 to be paid to Muda bin Jusoh. In the case of Ismail bin Omar, the Commissioner for Labour computed a compensation of $16,680.

On 13 September 1983, the case of Muda bin Jusoh was referred to the arbitrator, sessions court, Seremban, under s 30 of the Act by the use of Form D-1.

Similarly the case of Ismail bin Omar was referred to the arbitrator, sessions court, Seremban, on 15 November 1984.

The arbitrator in Arbitration No 3 of 1983, on 7 May 1987, confirmed the award made by the Commissioner for Labour to Muda bin Jusoh and ordered interest at 8% per annum and $200 as costs.

Likewise the arbitrator in Arbitration No 3 of 1984, on 3 April 1986, held the appellant (FELDA) herein is the 'principal' within the meaning of s 19 of the Workmen's Compensation Act 1952, and ordered the appellant to pay to Ismail bin Omar the compensation computed with costs to be taxed.

The two appeals herein are against the decision of the arbitrator aforesaid.

The first ground of appeal is on limitation that the claim of the respondent in both appeals is time-barred

under s 12(1) of the Act and s 2(a) of the Public Authorities Protection Act 1948. It is claimed that the appellant (FELDA) comes within the ambit of s 2(a) of the Public Authorities Protection Act 1948 by virtue of s 65(1) of the Land Development Ordinance 1956.

Clearly the claim by the respondents should have been instituted within six months of the date of occurrence of the accident, ie within six months from 26 July 1979 in the case of Muda bin Jusoh and six months from 18 September 1980 in the case of Ismail bin Omar (see s 12(1) of the Act). The respondent in the first appeal had instituted the proceedings some three years and ten months, and the respondent in the second appeal some two years eight months and twelve days after the occurrence of the accident. Clearly the claims are statute barred by time. However, this defence of time-bar was not taken up before the Commissioner for Labour and also not taken up before the arbitrator.

Although the court had allowed this point of law to be introduced as an additional ground of appeal, this was purely to hear the whole spectrum of the appeals to see whether this ground would make these cases exceptional on this point of time limitation, especially the reason why it was not taken up before the Commissioner of Labour and the arbitrator.

From the affidavits and the submissions, this court is unable to gather any grounds as to why this point of law was not raised in the arbitration proceedings and before the Commissioner of Labour. As such there is no merit and this point of law of time bar cannot be considered at all at this stage. Hence on this ground, ie limitation, the appeals fail. Even in an action on the pleadings, the defence has to plead the point of limitation at the very outset. This principle is applicable in cases of this sort before the Commissioner of Labour and if it was not raised there, it is too late now.

The second ground of appeal is whether the appellant (FELDA) is the '*Principal*' within the meaning of s 19(1) of the Act.

The appellant (FELDA) entered into a contract with Fang Lam Fatt (in the first appeal) and Syarikat Muhibbah Jaya (in the second appeal) to fell trees and clear the jungle. The contractors *employed* the two respondents to do the work. The terms of employment were set by the contractors and the wages of the respondents were paid by the contractors. The appellant (FELDA) had no control whatsoever on the respondents. Could the work that was being done by the respondents by virtue of their employment with the respective contractors Fang Lam Fatt and Syarikat Muhibbah Jaya come within the meaning of 'in the course of or for the purpose of his trade or business contracts with any other person otherwise than as a tributer (in this section referred to as 'the contractor') for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him ...'? (Section 19(1) of the Act 1952).

The appellant (FELDA) would be liable if the work that was being carried out by the respondents was for the purpose of or in the course of the appellant's (FELDA) *trade or business contracts.*

'*Trade*' is the practice of some occupation, business or profession habitually carried on as a means of one's livelihood or gain. Commonly it is known as buying and selling of goods.

'*Business*' is the state of being busily engaged in anything. It also encompasses trade, profession, any work or occupation, dealing and commercial transaction.

Of course the appellant (FELDA) here is not engaged in selling or buying any goods. But it is a statutory body entrusted with the job of clearing jungle and to see that the cleared areas are suitable for planting rubber and palm oil. Surely by any definition, it is the business of the appellant (FELDA) to fell trees and to clear jungles and to prepare the cleared areas of land for resettlement of settlers, in pursuance of the land development scheme, whether done by appellant itself or through contractors employed by appellant.

It is therefore the view of this court that the work that was being carried out by the two respondents here, even though they were employed directly by the contractors aforementioned, was in the course of and for the purpose of the appellant's (FELDA) business.

It follows therefore that the appellant (FELDA) is 'the principal' within the meaning of s 19(1) of the Act. On this ground too the appeals fail.

Since this court is of the view that the work which was being carried out by the two respondents here was in the course of and/or for the purpose of the appellant's (FELDA) business, it follows that the work of felling the trees was the work undertaken by the appellant (FELDA). In fact it is the statutory function of FELDA (the appellant) to undertake this business of felling the trees and clearing the jungle and preparing the land for planting rubber and palm oil by settlers on land resettlement schemes so opened by FELDA.

As stated by the arbitrator, the respondents were employed as chain-saw operators. Their job was to fell trees. They were thus engaged in the course of or for the purpose of appellant's trade or business. This

court is in complete agreement with that pronouncement except for the word 'trade' — it should be FELDA's 'business'.

The two appeals are therefore dismissed with costs.

Appeals dismissed.

Solicitors: *Ranjit, Thomas & Kula; Mohd Akhir & Partners.*

Reported by *Mathavan Devadas*

Re A Juvenile

HIGH COURT (SEREMBAN) — JUVENILE REVISION NO 43-20 OF 1990
MUSTAPHA HUSSAIN J
22 FEBRUARY 1990

Criminal Procedure — Revision — Juveniles — When a juvenile can be caned — Application of the Criminal Procedure Code to juvenile cases — Criminal Procedure Code (FMS Cap 6), s 293 — Juvenile Courts Act 1947, s 12(3)

Criminal Procedure — Administration of criminal justice — Judge can never be executioner

The juvenile in the case under review was convicted and sentenced in a juvenile court to be caned by the hearing magistrate. The magistrate personally caned the applicant eight times, exercising his powers under s 293 of the Criminal Procedure Code (FMS Cap 6) ('the Code'). The High Court called the case up for revision.

Held, that s 293 of the CPC is not applicable in this case:

(1) The sentences of punishment that can be imposed on a juvenile are contained in the Juvenile Courts Act 1947 ('the JCA'). There is no provision in the JCA providing for caning to be carried out nor by the magistrate personally.

(2) Section 293 of the Code deals with a situation where a juvenile is being charged together with an adult in an open criminal court, and cannot be applied to a juvenile court.

(3) The applicant had not been convicted in a criminal court. Juveniles are not convicted but found guilty and a juvenile court is not an open criminal court.

(4) A judge can never be the judge and executioner at the same time in a case.

Legislation referred to
Criminal Procedure Code (FMS Cap 6) s 293
Juvenile Courts Act 1947 ss 3A(5), 4(1), (5), 12(1), (2), (3)

Cur Adv Vult

Mustapha Hussain J: This is a Juvenile Revision initially called upon by this High Court on receipt of an undated and unsigned letter on 15 February 1990. Normally unsigned letters are not entertained but since the contents made allegations of illegality, where the punishment imposed, and there are a few more to be imposed, is *irreversible*, this court is bound and justified in calling for the file from the trial court to look into the allegations.

The magistrate had himself personally caned the juvenile eight times in his chambers on 14 February 1990 at the Rembau magistrate's court.

The magistrate too by his letter dated 17 February 1990 had asked for revision of the order he had made.

Juvenile cases are dealt with under the provisions of the Juvenile Courts Act 1947 ('JCA' for short). The JCA specifically provides for a separate court known as a Juvenile Court (s 4(1)) away from the ordinary open court (ie open to the public) and usually the juvenile court sits in chambers (s 3A(5)) — closed to all except the juvenile, the parents or guardians, the prosecuting officer, the two advisers and of course the magistrate (who should be a first class magistrate). If the juvenile does not admit to the charge and claims trial, then the usual witnesses involved will have to give the usual evidence. The juvenile can be represented by counsel.

The two advisers' function is to inform and advise the magistrate on matters affecting the punishment and other treatment to be imposed against the juvenile in the event the Juvenile Court makes a finding of guilt (s 4).

The words '*conviction*' and '*sentence*' cannot be used as far as juveniles are concerned. Instead the words used are '*finding of guilt*' and '*order made upon finding of guilt*' (see s 12(3)).

Only when the Juvenile Court is satisfied that an offence *has been proved* does the court have the power to impose the various forms of orders on the juvenile and/or his parents or guardians, all set out under s 12(1) and (2). Nowhere in the JCA is there any provision for caning to be carried out nor by the magistrate personally.

This juvenile, whose case is under revision now, was caned eight times by the magistrate personally. The magistrate was exercising his power under s 293 of the Criminal Procedure (FMS Cap 6) ('CPC') according to the notes of evidence.

Section 293 of the CPC reads as follows:

> (i) When any youthful offender is *convicted before any Criminal Court* of any offence punishable by fine or imprisonment, such Court may *instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment* —
>
> (a) order ...
> (b) ...
> (c) order such offender, if a male, to be whipped with not more than ten strokes of a light cane or rattan within the Court premises and in the presence if he desires to be present, of the parent or guardian of such offender; or